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Khairul Sham bin Ahmad & Anor v Yesudass a/l Michaelsamy

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R2–12–324 OF 2002
FAIZA TAMBY CHIK J
14 JANUARY 2003

B

Tort — Damages — Personal injuries — Medical expenses — Private hospital — Whether medical expenses paid by private and personal insurer recoverable — Who has right to recover

C

This was an appeal against part of the decision delivered by the sessions court judge in relation to the award to the respondent ('plaintiff') for medical expenses incurred in a private hospital that was actually satisfied by the plaintiff's insurer. The sessions court judge has awarded the plaintiff a sum of RM30,000 out of RM40,000 that was claimed by the plaintiff as medical expenses incurred at Ampang Puteri Hospital. The issue in this appeal was whether the plaintiff is entitled to recover the medical expenses satisfied by his insurer.

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Held, allowing appellants appeal with costs:

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(1) The plaintiff testified that he incurred a medical bill of RM40,000 and the said bill was paid by his insurer ACE General Insurance Bhd. Therefore, the plaintiff's medical bill does not amount to out-of-pocket expenses. It was not paid by the plaintiff and therefore was not a loss to the plaintiff. Hence, the sessions court judge has erred in law in awarding the plaintiff the sum of RM30,000. The sessions court judge's action has enriched the plaintiff by RM30,000 out of this accident (see para 5).

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(2) The plaintiff cannot claim for the medical expenses paid by the insurance company because the right to recover the medical expenses lies in the hand of his insurer. The medical expenses of RM30,000 awarded by the sessions court judge has enriched the plaintiff. This enrichment has violated the philosophy behind the principle of compensatory damages upheld by this country. Therefore such an award shall not be allowed (see para 6).

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[**Bahasa Malaysia summary**

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Ini merupakan rayuan perayu-perayu terhadap sebahagian daripada keputusan hakim mahkamah sesyen berkenaan dengan award yang diberikan kepada responden ('plaintif') untuk perbelanjaan perubatan yang ditanggung di sebuah hospital swasta yang telah diselesaikan oleh penanggung insurans kepada plaintif. Hakim mahkamah sesyen telah mengawardkan kepada plaintif sebanyak RM30,000 daripada RM40,000 yang dituntut oleh plaintiff sebagai perbelanjaan

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perubatan. Isu di dalam rayuan ini adalah sama ada plaintif berhak untuk mendapat kembali perbelanjaan perubatan yang diselesaikan oleh penanggung insuransnya.

Diputuskan, membenarkan rayuan beserta kos:

(1) Plaintif telah membuat keterangan bahawa dia telah menaggung bil perubatan sebanyak RM40,000 yang telah dibayar oleh penanggung insuransnya, ACE General Insurance Bhd. Oleh itu, bil perubatan plaintif bukanlah merupakan perbelanjaan yang dikeluarkan daripada poketnya sendiri. Ia tidak dibayar oleh plaintif sendiri dan oleh itu bukan merupakan kerugian kepada plaintif. Jesteru itu, hakim mahkamah sesyen membuat satu kesalahan di segi undang-undang apabila mengawardkan RM30,000 kepada plaintif. Sebenarnya, tindakan hakim mahkamah sesyen telah memperkayakan plaintif sebanyak RM30,000 daripada kejadian ini (lihat perenggan 5).

(2) Plaintif tidak boleh menuntut perbelanjaan perubatan yang dibayar oleh syarikat insurans kerana hak untuk mendapatkan semula perbelanjaan perubatan terletak ditangan penanggung insuransnya. Perbelanjaan perubatan berjumlah RM30,000 yang diawardkan oleh hakim mahkamah sesyen telah memperkayakan plaintif. Pengayaan ini telah mencabuli falsafah disebalik prinsip ganti rugi pampasan yang dipegang oleh negara ini. Oleh itu, award tersebut tidak boleh dibenarkan (lihat perenggan 6).]

Notes

For cases on personal injury, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 212–213.

For cases on medical expenses, see 6 *Mallal's Digest* (4th Ed, 2004 Reissue) paras 741–742.

Cases referred to

Glynn v Scottish Union & National Insurance Co Ltd [1963] 40 DLR (2d) 929(refd)

Harcharan Singh a/l Saudagar Singh v Hassan b Ariffm [1990] 2 CLJ 393(refd)

Heng Poh Keat & Anor v Aphissit Sae Wong [2001] MLJU 13; [2001] 1 CLJ 836 (refd)

Ng Aik Kian & Anor v Sia Loh Sia [1997] MLJU 143; [1997] 2 CLJ Supp 218 (refd)

Ong Ah Long v Dr S Underwood [1983] 2 MLJ 324 (refd)

Parry v Cleaver [1969] 1 All ER 555 (refd)

Perganathan Karpaya v Choong Yuk Sang & Anor [1995] MLJU 246; [1996] 1 CLJ 622 (refd)

Sam Wun Hoong v Kader Ibramshah s/o Pichay [1981]) 1 MLJ 295(refd)

Tang Sia Bak v Mooi Kim Ming & Anor (Supreme Court Civil Appeal No 249–87 (refd)

Razlan Hadri (Gan, Ho & Razlan) for the appellants.

Jagir Singh (Jagir Singh & Co) for the respondent.

Faiza Tamby Chik J:

[1] This is the appeal of the appellants against part of the decision delivered on 19 April 2002 by the learned sessions court judge. The appeal is in relation to the award to the respondent for medical expenses incurred that was actually satisfied by the private and personal insurer of the plaintiff. The learned sessions court judge has awarded the respondent a sum of RM30,000 out of RM40,000 that was claimed by the respondent as medical expenses incurred in Ampang Puteri Hospital.

[2] The respondent has claimed against the appellants amongst other things, special damages of RM40,000 as medical expenses incurred in Ampang Puteri Hospital. As a general rule, damages for personal injuries which incur pecuniary loss, is best explained in *Halsbury's Laws of England*, 4th Ed, Vol 12, Butterworths (London) 1975, para 1151 with the title of '*Pecuniary loss through personal injuries*', which reads as follows:

> In the case of pecuniary loss, such as loss of profits or earnings, the principle of *restitutio in integrum* applies, and the plaintiff is entitled to be put in the position in which he would have been if the injury had not occurred, though deductions may fall to be made for benefits received, and as regards further loss the chances, both favourable and unfavourable, fall to be reflected in the award.

[3] The above view is supported by Lord Morris of Borth-Y-Gest in the case of *Parry v Cleaver* [1969] 1 All ER 555 at p 565 which reads:

> In my view, the general principle and the general approach in calculating monetary loss in a case such as the present is that an injured person should receive such an amount of money as will put him in the same position as he would have been in if he had not received the injuries (see *British Transport Commission v Gourley* [1956] AC 185; [1955] 3 All ER 796. A plaintiff should get such a sum in money as will represent the actual loss which has resulted to him in consequence of the defendant's negligence.

[4] Therefore, it is a clear principle that the purpose of damages is to put an injured party to the same position has had the tort not been committed, and recovery of damages is definitely not a mechanism for enriching the injured party. In the case of *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324 FC at p 327 per Syed Agil Barakbah FJ, 'In special damages claims the exact loss must be pleaded where the precise amount of item of damages had become clear before the trial either because it has already occurred and so become crystallised or because it can be measured with complete accuracy (MacGregor *on Damages* 14th Ed p 1012, para 1498)' and continues at p 334 'It has to be borne in mind that damages for personal injuries are not punitive and still less a reward. They are simply compensation that will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act, so far as money can compensate.'

[5] In the case of *Sam Wun Hoong v Kader Ibramshah s/o Pichay* [1981] 1 MLJ 295 FC at p 297 per Mohamed Azmi J, 'Special damage consists of out-of-pocket expenses, such as hospital bills and actual loss of earning during period of total incapacity, and is generally capable of substantially exact calculation,' I think special damages means 'out-of-pocket expenses' which consists of money incurred or paid by the plaintiff, which amounts to a 'loss' to the plaintiff. During the trial at the sessions court, the plaintiff testified that he incurred a medical bill of RM40,000 and the said bill was paid by ACE General Insurance Bhd his personal insurers. Therefore, it is my opinion that the plaintiff's medical bill does not amount to out-of-pocket expenses. It was not paid by the plaintiff and therefore was not a loss to the plaintiff. Hence, the learned sessions court judge has erred in law in awarding the plaintiff for the sum of RM30,000. The learned sessions court judge's action has enriched the plaintiff by RM30,000 out of this accident. In the case of *Parry v Cleaver* referred above, Lord Reid held that, *'British Transport Commission v Gourley* [1956] AC 185; [1955] 3 All ER 796 did two things. With regard to the first question it made clear, if it had not been clear before, that it is a universal rule that the plaintiff cannot recover more than he has lost. And, more important, it established the principle that in this chapter of the law we must have regard to realities rather technicalities.' The plaintiff admitted during examination-in-chief that his insurer paid for his medical bill. He did not pay the bill himself. He incurred no expenses with respect to the medical bill. Therefore, he has no right to be compensated for the said bill. The plaintiff is refrained from claiming more than what he has lost. McGregor *on Damages*, 16th Ed Sweet & Maxwell Ltd (London), para 1674 reads:

> Where a plaintiff's medical expenses have been paid for him under a private medical insurance scheme to which he subscribes, such as that run by BUPA or PPP, the question of whether he is entitled nevertheless to claim the expenses as part of his damages is a question which does not arise because the insurances under these schemes, unlike the accident policies considered when dealing with loss of earning capacity, are regarded as indemnity insurances which entitle the insurers themselves to recover their outlays directly from the tortfeasor through the medium of subrogation. Thus the injured party has no standing to claim the medical expenses; he has been made whole by his insurers who in their turn step into his shoes and make the claim for the moneys expended by them.

[6] Hence, it is clear that the plaintiff cannot claim for the medical expenses paid by the insurance company because the right to recover the medical expenses lies in the hand of his insurer. The medical expenses of RM30,000 awarded by the learned sessions court judge has enriched the plaintiff. This enrichment has violated the philosophy behind the principle of compensatory damages upheld by this country. Therefore such an award shall not be allowed.

[7] It must be noted that in the situation of an accident policy, an insurance company would make a lump-sum payment to the insured on the occurrence of a specific event, for example loss of a leg. In the normal circumstances, the

sum of payment is dependent on the 'sum insured' and therefore it differs from case to case. On the other hand, an insurance policy that reimburses or makes a fixed amount of payment when the insured has incurred or spent a specific sum is called an 'indemnity policy'. Under this 'indemnity policy', the insurance company will only make payment for proved expenses, ie RM1 for RM1 and will not pay a single cent more. For example, when a hospital issues a bill of RM19,999, the insurance company will pay for RM19,999 only. In our case the insurance policy taken up by the respondent was an 'indemnity policy' and not an 'accident policy', whereby the insurance company has paid the hospital bill incurred by the respondent, ie RM40,000 and not a single cent more. In McGregor on damages it is very clearly explained the difference between an 'indemnity policy' and 'accident policy' and whether the plaintiff or the insurance company has a cause of action. In a book by Michael F Rurter, *Handbook on Damages for Personal Injuries and Death in Singapore and Malaysia* 2nd Ed Butterworths Asia, 1993 at footnote 103:

> But insurance policies that pay a lump sum upon a specific event (eg an accident, or loss of an eye, etc) are to be distinguished from policies which pay only to the extent of proved financial expense (indemnity policies). In the case of the latter the insurer has a right to be subrogated to the plaintiff's claim and if the plaintiff recovers damages, he holds them on trust for the insurer, so there is no double recovery.

[8] In the case of *Glynn v Scottish Union & National Insurance Co Ltd* [1963] 40 DLR (2d) 929, whereby the Ontario Court of Appeal held that, per Kelly JA:

> But where a contract of insurance provides that the insurer will pay to the insured the amount of any medical, hospital or nursing expenses and loss of earnings resulting from an accident, the insured would be required to prove before becoming entitled to payment, (1) the occurrence of an accident within the meaning of that term as defined in the policy, and (2) the amount of the hospital, medical and nursing expenses and loss of earnings resulting from the accident. Although such a contract might commonly be referred to as a personal accident insurance policy, in my view, since the right to recover depends on the proof of financial loss as well as the happening of the accident, it would be a contract of indemnity and in the absence of express provisions to the contrary would entitle the insurer to be subrogated to the rights of the insured.

Similarly, Rutter and Kelly JA have made a distinction between an accident policy and an indemnity policy.

[9] As a matter of interest I would like to say something about the one-third rule. This is widely known as the 'one-third rule', wherein all the private hospital/medical bills will be reduced to one-third of the total amount incurred. This rule is said to have its origin in the Supreme Court case of *Tang Sia Bak v Mooi Kim Ming & Anor* (Supreme Court Civil Appeal No 249–87). This 'one-third rule' has been widely accepted and adopted in numerous High Court cases. Cases which supported the aforesaid principle are *Harcharan Singh a/l Saudagar Singh v Hassan b Ariffm* [1990] 2 CLJ 393, *Perganathan Karpaya v Choong Yuk Sang &*

Anor [1996] 1 CLJ 622, *Ng Aik Kian & Anor v Sia Loh Sia* [1997] 2 CLJ Supp 218 and *Heng Poh Keat & Anor v Aphissit Sae Wong* [2001] 1 CLJ 836. In the case of *Heng Poh Keat* referred above, Hishamudin Yunus J held that, 'In my judgment, the majority approach (ie the one-third rule) is the better view (notwithstanding the misconception about the effect of the Supreme Court decision in *Tang Sia Bak*) because such a rule is in line with the principle that a plaintiff is under a duty to mitigate his loss.' In our case there was no evidence led during the trial in regards to the emergency of the plaintiff's situation for the plaintiff's admission to Ampang Puteri Hospital. The plaintiff did not give any evidence that admission to the government hospitals was unreasonable or impractical in this case. The plaintiff has also failed to give evidence that the government hospital was unable to give equal services and facilities as compared to the private hospital. In addition, the Kuala Lumpur General Hospital is in the vicinity of the accident. In this case the plaintiff who is under every moment and circumstances to mitigate his loss has failed to do so. Therefore, it is the appellants' submission that the learned sessions court judge has erred in law in taking wrong factors into consideration and not following High Court cases cited above which is *stare decicis* for the sessions court. However, as I have decided otherwise as abovementioned the special damages for medical/hospital bill shall not be reduced to one-third. To conclude the appellants' appeal is allowed with costs.

Appeal allowed with costs.

Reported by AG Kalidas